

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 26, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 92-2936-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY L. BANKHEAD,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County:
MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Terry L. Bankhead appeals from a judgment convicting him of delivering cocaine. The state public defender appointed Attorney Lynn M. Bureta as Bankhead's appellate counsel. Bureta filed and served a no merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Bankhead filed an extensive response. After an independent review of the appellate record as mandated by *Anders*, we conclude that any further appellate proceedings would lack arguable merit.

Bankhead pled guilty to three counts of delivering cocaine as a repeater, contrary to §§ 161.16(2)(b), 161.41(1)(c) and 161.48, STATS., 1991-92. The trial court imposed two consecutive nine-year sentences on two counts, and imposed but stayed a ten-year consecutive sentence and placed Bankhead on a ten-year consecutive term of probation on the third count.

Appellate counsel addresses whether: (1) there was a sufficient factual basis to accept the pleas; (2) Bankhead entered knowing, intelligent and voluntary pleas; (3) the trial court erroneously exercised its sentencing discretion and based its sentence on inaccurate information in the presentence investigation report (PSI); and (4) Bankhead received ineffective assistance of trial counsel. After reviewing the appellate record, we agree with counsel's analysis and her conclusion that these issues lack arguable merit.

In his response, Bankhead raises these issues and several others. He contends that: (1) the substance he possessed was not cocaine; (2) the sentence imposed was illegal; (3) he is entitled to withdraw his guilty pleas; and (4) he was denied the effective assistance of appellate counsel. We address Bankhead's contentions seriatim.

Bankhead contends there was no factual basis to convict him of three counts and that the substance involved was not cocaine. However, defense counsel stipulated that the evidence at the preliminary hearing provided a factual basis for the pleas. In the guilty plea questionnaire and waiver of rights (questionnaire), Bankhead initialed his assent to the court's use of the complaint as a factual basis for his guilty pleas. In his response, Bankhead contends that he believed that by pleading guilty, the State would dismiss two of the three counts in their entirety. However, the questionnaire and transcript of the plea hearing indicate that the State only agreed to dismiss the allegations that each crime occurred within 1000 feet of a school, substantially reducing his sentencing exposure. Section 161.49, STATS.

At the preliminary hearing, the parties stipulated "to the cocaine and to the identity of the substance as being cocaine for the prelim only." At that time, the prosecutor offered a copy of the lab reports into evidence and

defense counsel did not object.¹ While this stipulation was limited to the preliminary hearing, entry of the guilty pleas constitutes an admission that these substances were cocaine.

Bankhead contends that his pleas were not entered knowingly, intelligently and voluntarily. A guilty plea waives all nonjurisdictional defenses. *State v. Riekkoff*, 112 Wis.2d 119, 123, 332 N.W.2d 744, 746 (1983). A challenge to the validity of a plea must be raised initially in the trial court. *County of Racine v. Smith*, 122 Wis.2d 431, 438, 362 N.W.2d 439, 442 (Ct. App. 1984). Bankhead moved to withdraw his pleas in the trial court, but later withdrew the motion. We independently review the record to determine whether any arguable basis exists for Bankhead to challenge his pleas.

The trial court must comply with the requirement for accepting a plea. Section 971.08(1), STATS.; *State v. Bangert*, 131 Wis.2d 246, 261-62, 389 N.W.2d 12, 21 (1986). The trial court must determine the defendant's education and general comprehension and establish his understanding of the nature and range of punishment of the crimes charged. *Id.* at 261, 389 N.W.2d at 21. It also must ascertain whether there were any promises or threats relating to the defendant's appearance and his or her proposed pleas and whether a factual basis exists to support the pleas. *Id.* at 262, 389 N.W.2d at 21.

The trial court addressed Bankhead personally and explained how dismissal of the § 161.49, STATS., allegation reduced the sentencing exposure for each of the crimes. The trial court asked Bankhead whether he had reviewed the questionnaire with trial counsel and confirmed that he initialed twenty-three separate paragraphs and that he understood the questionnaire's contents. Bankhead indicated in the questionnaire that he was twenty-eight years old, had completed the tenth grade and had obtained his general equivalency diploma. He also indicated that he was not using alcohol, drugs or medication that would interfere with his understanding of court proceedings. Bankhead understood the numerous constitutional rights he was forfeiting. Although Bankhead complains that the trial court's colloquy was principally with trial counsel, trial counsel explained the various nuances of this particular plea

¹ Those lab reports indicate a substantial amount of cocaine in each plastic bag submitted for chemical analysis.

agreement to the court and the extent of his discussions with Bankhead. Bankhead could have addressed the court to correct any misstatements by trial counsel. He did not do so and answered the trial court's inquiries. We conclude that the plea colloquy and the questionnaire indicate that Bankhead understood the proceedings and that he entered his guilty pleas knowingly, intelligently and voluntarily. Challenging the pleas would lack arguable merit.

Bankhead is confused about which charges were dismissed. However, the confusion in his response cannot override his understanding at the plea hearing, and confirmed in the questionnaire, where trial counsel and the court explained the ramifications of the plea agreement to him. Incident to the plea agreement, the school zone enhancer of § 161.49, STATS., was dismissed; the repeater enhancer of § 161.48, STATS., was not.

Bankhead argues that he was convicted of violating § 161.14(2)(b), STATS., instead of § 161.16(2)(b), STATS. Bankhead is correct that the trial court found him "guilty of the crime of delivery of a controlled substance in violation of 161.14(2)(b) and 161.41(1)(c) and 161.49." However, our review of the record, including the questionnaire, transcripts and the judgment, demonstrates that the trial court's oral acceptance of Bankhead's plea to having violated § 161.14(2)(b), instead of § 161.16(2)(b), was not prejudicial because he clearly understood at that time that he had pled guilty to violating § 161.16(2)(b). Likewise, the trial court's failure to accept his pleas to these crimes as a repeater was not prejudicial since the remainder of the record clearly indicates that Bankhead knew that he was pleading guilty as a repeater. *See* § 161.48, STATS.

Bankhead also contends that the sentence must be vacated because it exceeds the maximum sentencing exposure for these crimes. However, as discussed previously, each penalty was enhanced because he pled guilty to delivery of cocaine as a repeater under § 161.48, STATS. Bankhead also contends that the PSI inaccurately states that he was involved with gangs. He acknowledges that the trial court did not consider the inaccurate information at sentencing, but that the inaccuracies regarding gang involvement have followed him in prison. However, trial counsel corrected several inaccuracies in the PSI, including the misinformation on gang involvement. The trial court applied the appropriate sentencing factors. Consequently, challenging the sentence would lack arguable merit.

Bankhead also claims ineffective assistance of appellate counsel and resents her filing a no merit report. However, RULE 809.32(1), STATS., recognizes the inherent disagreement between appellate counsel and an appellant, thereby providing the appellant with an opportunity to respond.² Bankhead's contention that appellate counsel was ineffective must be pursued by a petition for a writ of habeas corpus in this court. See *State v. Knight*, 168 Wis.2d 509, 522, 484 N.W.2d 540, 545 (1992). We will not review it on direct appeal. See *id.* at 512-13, 484 N.W.2d at 540-41.

We have addressed each issue disclosed by Bankhead. Upon our independent review of the record as mandated by *Anders* and RULE 809.32(3), STATS., we conclude that there are no other meritorious issues and that any further appellate proceedings would lack arguable merit. Accordingly, we affirm the judgment of conviction and relieve Attorney Lynn M. Bureta of any further appellate representation of Bankhead.

By the Court.—Judgment affirmed.

² The statutes do not similarly allow a party who disagrees with counsel in a contested appeal to file a separate brief in addition to that filed by counsel. See RULE 809.19, STATS.